Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY GEALER AND THE FOURTH DREAMER, INC.

PETITIONERS

vs.

UNITED STATES OF AMERICA; ITS AGENCY THE INTERNAL REVENUE SERVICE; KRISTINA STANLEY, REVENUE AGENT

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Administrative Procedures Act, 5 U.S.C. § 702 constitutes a waiver of sovereign immunity so that the United States District Court has jurisdiction to review Internal Revenue Service (IRS) agency action?

(2) Whether the Anti-Injunction Statute, 26 U.S.C. § 7421, or the Declaratory Judgment Act, 28 U.S.C. §2201, bar the United States District Court from exercising subject matter jurisdiction over a complaint for Declaratory and Injunctive Relief against the Internal Revenue Service?

(3) Whether this Court should overturn or recognize a judicial exception to the Sovereign Immunity Doctrine when the Internal Revenue Service may take coercive actions against the Plaintiffs/Petitioners in the United States District Court?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding, namely:

Petitioners:

1. Gary Gealer; and
2. The Fourth Dreamer, Inc. There are no affiliated corporations known to Petitioners; and

Respondents:

1. United States of America;
2. Internal Revenue Service, a governmental agency;
3. Revenue Agent Kristina Stanley, an Agent of the Internal Revenue Service

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PETITION FOR WRIT OF CERTIORARI

Gary Gealer and The Fourth Dreamer, Inc. (4th Dreamer) respectfully petition for a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is not certified for publication but is unofficially reported at 2000 U.S. App. Lexis 11835 and at 2000-1 U.S. Tax Cas. (CCH) P50,511.

The opinion of the United States District Court, Central District of California is unofficially reported at 1999 U.S. Dist. Lexis 11237 and 98-2 U.S. Tax Cas. (CCH) P50,594 and at 82 A.F.T.R.2d. (RIA) 5669.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §1254(1). The United States Court of Appeals for the Ninth Circuit entered its order on May 24, 2000.

STATUTORY PROVISIONS INVOLVED

Title 5 U.S.C. §702 holds:

> "A Person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency actions within the meaning of a relevant statute, is entitled to judicial review thereof.

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.
>
> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. Sec. 702 (West 1998).

The full text of the following sections is provided in the appendix, pursuant to Supreme Court Rule 14.1(f), at pages A-30 through A-31: Title 5 U.S.C. §704, Title 28 U.S.C. §1331, Title 28 U.S.C. §1340, 26 U.S.C. §7421(a), 28 U.S.C. §2201.

STATEMENT OF THE CASE

Gary Gealer, who at all relevant times owned 50% of The Fourth Dreamer, Inc. (hereafter "4th Dreamer"), a Chapter C corporation, sued the United States of America, its agency the Internal Revenue Service ("IRS"), and IRS Revenue Agent Kristina Stanley ("Stanley") in the United States District Court seeking declaratory and injunctive relief following the legally unjustified refusal of Stanley and the IRS to allow Gary Gealer to participate in full parity with Michael Weiner, the other former 50% owner of the corporation, in the audit of 4th Dreamer. The IRS sought to audit 4th Dreamer's Form 1120 tax return for the taxable years ended May 31, 1995 and May 31, 1996. Gealer was the corporate officer who signed the 1995 tax return. Gealer sought to present relevant documents and records to the IRS to dispose successfully of audit and examination issues which if found against the corporation would have financially burdened Gealer personally. Without material substance or justification the IRS refused to allow Gealer to have contemporaneous access to participate in the audit with Weiner because the IRS inexplicably and unlawfully concluded Weiner was now the sole owner of 4th Dreamer.

Gealer contends that the United States District Court had jurisdiction to hear his complaint under 5 U.S.C. §702 and other theories. The United States District Court for the Central District of California, however, dismissed Gealer's complaint on the grounds the Doctrine of Sovereign Immunity deprived the Court of jurisdiction. The District Court held that the Administrative Procedures Act (APA) 5 U.S.C. §701 et seq. did not waive sovereign immunity in part because of 26 U.S.C.

§7421 and 28 U.S.C. §2201, which the Court held bar suits to restrain the assessment or collection of a tax.

The United States Court of Appeals for the Ninth Circuit dismissed Gealer's appeal on the grounds that the audit of 4th Dreamer was completed making the appeal moot. Gealer contends the audit is not complete; the IRS once expanded the audit to include 1996 and maintains the power to expand the audit into other years.

I. The Underlying Dispute

After the IRS gave notice that it desired to audit 4th Dreamer, Gealer retained counsel, Lon B. Isaacson Associates, An Affiliation Including a Professional Law Corporation ("Isaacson"), to represent himself and 4th Dreamer in the audit. He did so according to authority granted him by contract with Weiner, the other former 50% shareholder of 4th Dreamer[1].

Notwithstanding the fact Isaacson was fully qualified to represent Gealer and 4th Dreamer, the assigned IRS employees refused to even acknowledge the power of attorney that Gealer executed appointing Isaacson as his and the corporation's tax attorneys. Thereupon Gealer was forced to instruct his attorneys to write repeated letters to the IRS explaining his right to participate fully in the audit. The IRS stonewalled, and inexplicably refused Gealer's entreaties.

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1. In November 1995 Gealer paid $5,000 to Weiner for wind-up, termination, and dissolution of 4th Dreamer and in exchange received Weiner's agreement Gealer would maintain sole authority to retain and employ tax counsel in the event that federal and/or state taxing authorities conducted an audit or examination of 4th Dreamer, at any time in the future.

In 1997 Gealer upon learning that Weiner, in violation of their termination agreement, continued to operate 4th Dreamer, signed a letter that stated that Gealer had not been involved with the daily operations of 4th Dreamer, after December 31, 1995. The Service incorrectly interpreted that letter to mean that Gealer had resigned all of his interests and offices in the corporation. Gealer was stating his belief that prior to December 1995 the corporation had been terminated, wound up and dissolved, and Gealer had received no compensation from 4th Dreamer after that date.

Finally, on September 16, 1997 IRS District Counsel attorney Kirk Paxson wrote his version of an audit participation agreement binding the IRS and Gealer which he and Isaacson had been negotiating for many previous months. That seminal memorialization of the mutually binding agreement stated that Gealer would be treated "fairly" in the audit. Given that the letter did not assure Gealer that he would be allowed full participatory access to the audit in parity with Weiner, Gealer continued to be dissatisfied with the broad and bland assurances made by Paxson. In its underlying ruling, The District Court unjustifiably criticized Gealer for not fully explaining to the Court's satisfaction that the September 16, 1997 letter was not adequate. As it turns out, Gealer's misgivings were well founded. The IRS did not keep its written promises to Gealer and without consulting Gealer and without allowing him to participate in the audit the IRS issued a Notice of Deficiency to 4th Dreamer. Without Gealer's knowledge or consent, Weiner hired his own tax counsel who filed a Petition for Redetermination in the United States Tax Court. Contrary to the September 16, 1997 letter agreement, Gealer did not have, and has not been provided, any pre-determination notice from

the IRS concerning any issue being considered during this beginning stage of the audit.

After the IRS tried to summons the documents Gealer legally held, Gealer determined that to protect his rights he would require the intervention of the United States District Court. Initially, in his first Petition to Quash the Summons (hereafter "Gealer #1"), Gealer sought to quash the summons under 26 U.S.C. §7609.

The Court dismissed Gealer #1 on the grounds that Gealer was not a third-party record-keeper as defined in 26 U.S.C. §7609 and sovereign immunity had not been waived under that statute. The Court did not rule on issues seeking to invoke the Court's jurisdiction to provide declaratory and injunctive relief to Gealer under 5 U.S.C. §702, and other theories, raised in a First Amended Petition Gealer filed in the case.

The Petition/Complaint (Gealer #2) that brought about this appeal stems from Gealer's efforts to resolve an actual dispute that has arisen between Gealer and the IRS. Gealer steadfastly contended that he had the sole contractual right to represent 4th Dreamer in the audit. In opposition, the IRS contends that Gealer had and has no right to any information about the issues raised in the audit and has no right to participate in the audit in parity with Weiner. Gealer is thus exposed to personal tax liability passing down to him as a 50% shareholder of 4th Dreamer and at the same time is being unconstitutionally shut out of the 4th Dreamer audit and is being deprived of the right to participate in the IRS's examination of 4th Dreamer records.

Before Gealer filed a formal complaint in the United States District Court asking for declaratory or injunctive relief,

the IRS issued a second summons to Gealer. That second summons expanded the audit to include the fiscal year ended May 31, 1996. Gealer then concluded once again that to protect his rights it was incumbent upon him to challenge the summons and to seek declaratory and injunctive relief. Gealer never disputed that the IRS had the right to review the summoned documents under appropriate circumstances. Gealer likewise never disputed that the IRS had a right to assess taxes against 4th Dreamer. Finally, Gealer never asserted that the IRS should be barred from collecting any taxes the IRS determined to be owed.

Gealer sought not to stop the audit, but rather asked the District Court to declare and protect Gealer's full participatory rights in the audit of 4th Dreamer. Paragraph 115 of Gealer's complaint (hereafter "Gealer #2") made a request that the Court may determine that if Gealer were wrongfully denied the right to participate in the audit, that it would be fair to hold that Gealer would not personally be liable for any taxes the IRS might assess 4th Dreamer. The District Court incorrectly interpreted that paragraph as seeking to prevent the IRS from collecting a tax.

II. The Proceedings Below

A. The U.S. District Court Proceeding

The United States District Court for the Central District of California held a hearing on the United States' Motion to Dismiss Gealer's Petition/Complaint (Gealer #2). Gealer contends that the United States District Court had jurisdiction on multiple grounds, including 5 U.S.C. §702 combined with 28 U.S.C. §§1331 and 1340.

At oral argument, Gealer argued for "full parity with Michael Weiner" to participate in the audit. Judge Byrne chose

to focus on whether or not Gealer's real dispute was with Michael Weiner rather than the IRS. The Court mischaracterized Gealer's Complaint against the IRS as follows: "They can't audit you unless they audit me too..."

The Court summarized the issues as follows: "The question is: Can he quash the summons, and what we are really talking about is now a motion to dismiss the petition of Gealer..." The Court, therefore, incorrectly limited the issues that were before the Court. The Court concluded that if the Court enforced the summons, an issue not then before the Court, Gealer would be allowed to testify as to those documents. The Court then concluded at the hearing that a dispute as to Gealer's rights did not really exist between the parties. Gealer's counsel reminded the Court that if Gealer turned over the documents and testified about those documents, that would not be the end of the audit.

On July 1, 1998 the court entered its order dismissing Gealer's petition/complaint. The court held that the United States had not waived its sovereign immunity. See, A-12 through A-21. The Court ruled that 5 U.S.C. §702 waives the government's sovereign immunity under the following limited conditions: 1) claims are not for money damages, 2) an adequate remedy is not available elsewhere, and 3) its claims do not seek relief expressly or impliedly forbidden by another statute. See, A-15 (Citing to Tucson Airport Authority v. General Dynamics, (9th Cir. 1998) 136 F.3d 641, 645. The Court then held that Gealer did not meet the second and third elements. Id. A-16 through A-21.

The District Court reasoned that Gealer's alternative remedy was to await post-audit litigation and that Gealer's

claims were forbidden by both 26 U.S.C. §7421 and, 28 U.S.C. §2201. Id.

The District Court also rejected Gealer's argument that the District Court had jurisdiction to hear Gealer's complaint for injunctive and declaratory relief because the Government had the authority to bring coercive actions against Gealer to enforce the summons. See, A-26 through A-27.

2. The Ninth Circuit Court of Appeals Proceeding

Gealer filed a timely appeal. At oral argument on the appeal, the panel of justices assigned by the Ninth Circuit Court of Appeals to hear the appeal asked pointed questions of the IRS as to whether or not the audit of 4th Dreamer was concluded. The attorney for respondents could not assure the panel that the IRS would not resume audit activities against 4th Dreamer for additional years. Nonetheless, the Ninth Circuit Court of Appeals dismissed the appeal as being moot. A1-3.

REASONS FOR GRANTING THE PETITION

The issue of whether or not the APA is a waiver of sovereign immunity and confers subject matter jurisdiction on the District Courts has created both inter-circuit and intra-circuit splits among the Courts of Appeals. The majority of courts appear to hold that the APA waives the government's sovereign immunity and confers subject matter jurisdiction on the District Courts. A minority of courts appear to hold that the APA does not confer jurisdiction on the District Courts, even in conjunction with 28 U.S.C. §1331.

Moreover, the courts appear to be split on whether or not 26 U.S.C. §7421 applies to a situation similar to the one

raised in Gealer's complaint. Judge Byrne of the United States District Court for the Central District of California held in this case that 26 U.S.C. §7421 barred Gealer's complaint under the APA. Other District Courts have held that 26 U.S.C. §7421, and the coterminous Declaratory Judgment Act, do not apply if the taxpayer is challenging *procedural* IRS maneuvers.

The decisions below are erroneous and the issues that they address are important for the orderly, fair and uniform administration and operation of our national income tax laws.

I. THE LOWER COURTS ARE SPLIT ON WHETHER OR NOT THE APA IS A WAIVER OF SOVEREIGN IMMUNITY AND AS TO WHETHER THE ANTI-INJUNCTION ACT PRECLUDES REVIEW OF THIS IRS ABUSIVE ACTION

A. The APA Issue

The Courts of Appeal are split as to whether or not the APA serves as a waiver of sovereign immunity and along with 28 U.S.C. §1331 confers subject matter jurisdiction. The first published opinion, Estate of Watson v. Blumenthal, 586 F.2d 925 (2nd Cir. 1978) held that the APA did not confer jurisdiction, even if applied with 28 U.S.C. §1331. The third circuit disagreed in Jaffee v. United States, 592 F.2d 712 (3rd Cir. 1979), on remand 468 F.Supp. 632 (DC NJ), Aff'd 663 F.2d 1226 (34d Cir. 1981), cert den 456 U.S. 972, 72 L.Ed.2d 845, 102 S.Ct. 2234 and cert den 441 U.S. 461, 60 L.Ed.2d 1066, 99 S.Ct. 2406.

The second circuit followed Watson, supra, in Doe v. Civiletti, 635 F.2d 88 (2nd Cir. 1980). An intra circuit split appears to have resulted following B.K. Instrument, Inc. v. United States, 715 F.2d 713 (2nd Cir. 1983). The Court in Sprecher v. Graber, 716 F.2d 968 (2nd Cir. 1983) construed the B.K. Instrument, case as an abandonment of Watson, supra.

However, in 1990 the Tenth Circuit followed and adopted the holding of Watson, supra, in Lonsdale v. United States, 919 F.2d 1440 (10th Cir. 1990)[2]; See also S.J. Groves And Sons, Co. v. United States, 495 F.Supp. 201 (D.C. D. Colo 1980). The Ninth Circuit in Lee v. Blumenthal, 588 F.2d 1281 (9th Cir. 1979) held that the APA did not waive sovereign immunity in some circumstances, but had previously held that the APA was a blanket waiver of sovereign immunity. Hill v. United States, 571 F.2d 1098 (9th Cir. 1978). The Ninth Circuit then held that the Tucker Act does not limit review by the Courts for equitable relief under the APA. Rowe v. United States, 633 F.2d 799 (9th Cir. 1980). In Tucson Airport Authority v. General Dynamics, 136 F.3d 641 (9th Cir. 1998) the Ninth Circuit held that the APA waives sovereign immunity if three conditions are met. In so holding, Tucson Airport Authority held that review is precluded if an alternative available remedy is present. No other court appears to share that view. In fact, Com. Of Mass. V. Department of Grant Appeals Bd., 815 F.2d 778 (1st Cir. 1987) (Definition of adequate alternative remedy in 5 U.S.C. §704 either ignored or construed broadly by the Courts so as to not preclude review) applied a standard that would not have held that post-audit review was an adequate remedy. See also Doe v. United States Civil Service Comm'n, 483 F.Supp. 539, 558 (S.D. NY 1980) (Statute that does not authorize declaratory relief and injunctive relief found not to be adequate alternative remedy to the APA). Therefore, Judge Byrne appears to be in conflict with other District Court rulings as to what is an adequate remedy[3].

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2. The Tenth Circuit appears to be split on this issue. See New Mexico v. Regan, 745 F.2d. 1318 (1984).

3. Judge Byrne cited to Zimmer v. Connett, 640 F.2d 208 (9th Cir. 1981) to support his theory that post-audit remedies were adequate.

The District of Columbia Circuit has held that the APA and 28 U.S.C. §1331 combine to waive sovereign immunity and confer subject matter jurisdiction. Nat'l Ass'n of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988). The District Court for Rhode Island reached a similar result. See Thibodeau v. Pierce, 683 F.Supp. 15 (D.R.I. 1988) as did the Fifth Circuit, Sheehan v. Army and Air Force Exchange Service,619 F.2d 1132 (5th Cir. 1980), Rev'd on other grounds 456 U.S. 728, and the First Circuit, Com. Of Mass, supra[4].

The published opinions from the district courts show a similar split. See Thibodeau, supra; S.J. Groves and Sons, Co., supra; United States v. Various Articles of Obscene Merchandise, 514 F.Supp. 463 (S.D. NY 1981)(applying Watson, supra and holding that APA did not waive sovereign immunity and that 28 U.S.C. §1331 did not confer subject matter jurisdiction so as to allow suit); Sharrock v. Harris, 473 F.Supp. 1173 (S.D. NY 1979) (same); Elliott v. Weinberger, 429 F.Supp. 414 (E.D. Wis. 1977) ("Section 702 neither confers jurisdiction nor constitutes a waiver of sovereign immunity"); Felkel v. U.S., 861 F.Supp. 507 (D.S.C. 1994) (citing to and following Lonsdale, supra. in holding that 5 U.S.C. §702 does not confer jurisdiction)[5].

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4. The Com. Of Mass case disagreed with Maryland Dept of Human Resources v. Dept of H.H.S., 763 F.2d 1441 (D.C. Cir. 1985) as to the meaning of money damages as used in the APA.

5. In summary, courts from the 2nd and 10th Circuits have held that the APA did not waive sovereign immunity and confer subject matter jurisdiction in conjunction with 28 U.S.C. §1331. However, each of those circuits have an internal split of authority. The 1st, 3rd, 5th, 9th, and District of Columbia Circuits have held that the APA waives sovereign immunity and under 28 U.S.C. §1331 the courts have jurisdiction to review agency actions. The District Courts are also split with some following the Watson, supra, and Lonsdale, supra, line of reasoning and

B. The Anti-Injunction and Declaratory Judgment Acts

Judge Byrne's July 1, 1998 decision appears to be in conflict with Rodriguez v. U.S., 629 F.Supp. 333. (N.D.Ill. 1986). Judge Byrne held that Rodriguez did not apply because Gealer had not cited to a statute that waived the government's immunity[6]. Judge Byrne contended that Rodriguez relied upon 26 U.S.C. §6213 in holding that the Anti-Injunction Act, 26 U.S.C. §7421, was inapplicable and not a bar to suit in that case. A17. However, Rodriguez appears to hold that the Anti-Injunction Statute was inapplicable because the lawsuit actually was a challenge to procedural activity by the IRS. Thus, Judge Byrne's creative reading of and finding a legal distinction from Rodriguez was actually a disagreement with the holding of the case and evidences Judge Byrne's refusal to follow Rodriguez.

Cunningham v. U.S.C.I.R., 165 B.R. 599 (N.D.Tex. 1993) is another case at odds with Judge Byrne's order. Cunningham held that the Declaratory Judgment Act did not prevent suits challenging the procedure the IRS followed in collecting taxes. Judge Byrne's order effectively held that Gealer could not challenge the procedure the IRS followed in assessing and collecting taxes.

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with the majority following the Jaffee, supra, line of reasoning.

6. Judge Byrne's argument to that effect is rather circuitous. Gealer had cited to the APA as a statute waiving sovereign immunity. Therefore, the Court seems to be arguing that Gealer had an obligation to cite to a statute waiving sovereign immunity in order to establish that the APA waived sovereign immunity.

Moreover, Gealer respectfully submits that Judge Byrne's order is in conflict with the legislative history behind the APA. Congress amended 5 U.S.C. §702 in Public Law 94-574. In House Report No. 94-1656, Congress stated that the purpose of the amendment to 5 U.S.C. Section 702 was "... to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review." H.R.Rep. No. 94-1656, 9th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. Vol. 5 6121, at 6121.

Congress disapproved the use of sovereign immunity as a defense when IRS action is challenged in the courts. This is recorded in the legislative history as follows:

> "The importance of ameliorating the effect of the sovereign immunity doctrine ... is emphasized by the number and variety of cases in which the defense is still raised. The committee has been advised that the doctrine has been invoked in hundreds of cases each year concerning agricultural regulations, governmental employment, *tax investigations*...
>
> In each instance, the sovereign immunity doctrine diverts the court's attention from the basic issue concerning the availability or scope of judicial review.
>
> Sovereign immunity beclouds the real issue whether a particular governmental activity should be subject to judicial review, and, if so, what form of relief is appropriate. Its elimination as proposed in S. 800, ...'would be a major step in rationalizing the law of judicial

> review of agency action. It might not change many outcomes, but it would force the courts to ask and to answer the right questions....'
>
> A review of the cases–as confused as they are–reveals one certain conclusion: where sovereign immunity has been held to be a bar to suit...unjust or irrational decisions have resulted." (emphasis added) Id. at 6129.

The legislature concluded that even if more cases were filed seeking judicial review, the increased caseload would be beneficial. Id. at 6130. Congress further opined in the legislative history that:

> "Courts can make a useful contribution to the administration of Government by reviewing the legality of official conduct which adversely affects private persons. The acceptance of judicial review is reflected not only in court decisions but in the many statutes in which Congress has provided a special procedure for reviewing particular administrative activity....Unfortunately, these special statutes do not cover many of the functions performed by the older executive departments, such as the...Treasury [Department]." Id. at 6125. (emphasis added).

Gealer contends that this Court must resolve this issue. If Congress intended to include the Treasury Department and tax investigations under the APA, then it would appear

inconsistent to hold that the Anti-Injunction Statute and the Declaratory Judgment Act prevent just such a review.

II. THE OPINIONS BELOW ARE ERRONEOUS

A. THE UNITED STATES DISTRICT COURT'S ORDER

Judge Byrne decided that the Court did not have jurisdiction based upon the Court's contention that the APA did not waive the government's sovereign immunity. In so holding, Judge Byrne concluded that Gealer had an adequate remedy for his request for declaratory or injunctive relief. The alleged requirement that there be no alternative remedy available to the petitioner is apparently imposed by Tucson, supra. However, as discussed the standards set forth in Com. Of Mass., supra, and Doe v. U.S. Civil Service Comm'n, supra, appear to conflict with Judge Byrne's ruling and set a different standard than the Ninth Circuit. Judge Byrne concluded that Gealer could protect his rights by simply allowing himself to be excluded from the audit of 4th Dreamer and litigating any result later with which he disagreed. Of course, the Court ignored the fact that Gealer correctly sought equal parity in the audit, which included contemporaneous receipt of all correspondence to the "taxpayer," the right to participate in any in-person meetings with the "taxpayer," and the right to respond timely to and to adduce documentary evidence illuminating any issues that the IRS raised during the audit and/or examination.

The IRS argued that Gealer would participate in the audit by producing documents and appearing at an examination to be completely controlled by the IRS. Gealer, of necessity, would not receive the treatment he sought by simply producing documents at an examination. Gealer demonstrated to the Ninth Circuit that, in fact, the IRS had completely excluded Gealer from all audit proceedings, including the issuance of a Notice of

Deficiency upon 4th Dreamer and all interviews that led to the resolution of issues raised in the audit.

The specific "post-audit remedy" that the District Court referred to --enforcement proceedings brought by the IRS under 26 U.S.C. Sec. 7402(b) and 26 U.S.C. Sec. 7604(a)-- is not a remedy available to Gealer because the Service, not Gealer, had to initiate the action. Moreover, the Courts have consistently enforced a summons when the IRS established that it has satisfied the minimal test of showing that the summons was procedurally proper and that the Service has not yet referred any taxpayer involved in that audit for criminal investigation. See U. S. v. Powell, 379 U.S. 48 (1964).

An available remedy cannot be found when it is the party's opponent who actually has the exclusive right to invoke the "remedy." The only available remedy to Gealer was to seek this pre-emptive order granting declaratory or injunctive relief. Further, the Court's prescribed "remedy" leaves Gealer entirely at the mercy of the IRS which had available to it the right to seek to hold Gealer in criminal contempt if he failed to comply with the Service's Summons. See 26 U.S.C. §7210. The risk of criminal prosecution for refusing to obey a summons is not a remedy for being shut out of an audit which exposes one to personal monetary liability.

Moreover, the case which the District Court relied upon, Zimmer v. Connett, 640 F.2d 208, 209 (9th Cir. 1981), in its assertion that enforcement proceedings constitute an alternative available remedy, is factually distinguishable from Gealer's case. Thus, the Courts below should have followed the standard in Doe v. U.S. Civil Service Comm'n, supra, and held that the audit and post-audit remedies were not adequate because they could not provide Gealer with declaratory or injunctive relief. In Zimmer, the taxpayer brought suit to challenge the Service's second examination of its tax records for a given tax year. The complaint contended that the District Court had jurisdiction under 28 U.S.C. § 1361 and clearly had the purpose of

preventing the IRS from conducting a second audit of the taxpayer. Id. The District Court dismissed the taxpayer's complaint and the Ninth Circuit affirmed on the grounds that the plaintiff failed to state a claim that was ripe for adjudication. Id. Judge Byrne in the instant case relied incorrectly upon the Zimmer Court's concern that even in a proceeding to enforce a summons, the Anti-Injunction Act might bar the District Court from exercising jurisdiction over an action "where the reasonableness of a second audit would be determined." Id. Unlike the taxpayer in Zimmer, Gealer did not challenge the legitimacy of the audit. He acknowledged repeatedly that the IRS had a right to audit 4th Dreamer. Moreover, he asserted jurisdiction under 5 U.S.C. §702, not 28 U.S.C. §1361. A present controversy existed and continues to exist as to whether or not Gealer should be allowed to participate in the audit with full parity with Weiner. Therefore, the issue was ripe for adjudication. The Zimmer case, supra, was thus factually and legally dissimilar and distinguishable from the case Gealer filed and cannot have any precedential weight. Moreover, the Court should disapprove the Zimmer rule as it denies taxpayers the right to obtain judicial review. As discussed, infra, the legislature intended the APA to allow review of IRS actions.

Therefore, the District Court erred by holding that Gealer had an adequate alternative remedy that would bar the Court from exercising jurisdiction over the United States of America and the IRS. The Court misinterpreted 5 U.S.C. §702 when it held that the Anti-Injunction Act expressly or impliedly forbade the relief Gealer requested. The clear language of 5 U.S.C. §702 only holds that it cannot be invoked "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Anti-Injunction Statute does not grant any consent to sue and therefore, could not be relied upon as authority to support Judge Byrne's erroneous ruling that the District Court did not have jurisdiction to review

Gealer's legitimate complaints against the IRS. Judge Byrne's interpretation contradicts the legislative history.

Moreover, assuming arguendo that 26 U.S.C. §7421(a) is a statute that is referred to in the language of 5 U.S.C. §702, Gealer's complaint was not brought for the purpose of "restraining the assessment or collection" of potential tax liability as proscribed by Section 7421(a). Gealer's request for injunctive and declaratory relief allowing Gealer to participate in the audit of 4th Dreamer in a full and fair manner and with complete parity with Michael Weiner is not a suit for the purpose of restraining the assessment or collection of any tax. In fact, had the Court granted the relief Gealer requested, and ruled that he be granted full parity with Weiner in the audit, the IRS would have been uninhibited in pressing forward the audit of 4th Dreamer.

Rodriguez v. U.S., 629 F.Supp. 333. (N.D.Ill. 1986) lends further, persuasive authority to Gealer's argument. In Rodriguez, the taxpayer brought suit to question the procedural validity of the Service levying his bank account, without warning, when the only reason he had an underpayment was because an IRS computer, without any request from him, erroneously generated a refund check. Rodriguez at 335. The Court found that neither the Anti-Injunction Act nor the Declaratory Judgment Act precluded the taxpayer from bringing a claim challenging the procedural validity of a tax assessment or collection attempt:

> "Plaintiff's claim takes this court into the maze of statutes which govern the assessment and collection of taxes...statutes which have erected a system described by one federal court

> as: "unworkable" and "so complicated that even the IRS admits it cannot completely understand it." *White v. Commissioner of Internal Revenue, 537 F.Supp. 679, 689 (D.Colo. 1982).*
>
> This court, however, believes it has threaded a route through the maze. *When an action challenges only the procedural validity of a tax levy, not the merits of the alleged tax liability, a federal district court has jurisdiction and can grant injunctive and declaratory relief.* (emphasis added) Id. at 336.

The District Court attempted to distinguish Rodriguez by noting that the Rodriguez case also involved the application of 26 U.S.C. §6213(a). However, that distinction has no bearing on the ultimate holding of the Rodriguez case, that the Anti-Injunction Statute by its own language does not prohibit the Courts from reviewing *procedural* aspects of an IRS audit.

Further, in Sea-Land Service, Inc. v. United States, (D.C. NJ 1985) 622 F.Supp. 769, 771, the Court held that "it is, however, well-settled that the exception for federal taxes does not bar actions by *non-taxpayers* who seek neither to restrain the assessment of taxes nor to dispute the taxpayer's ultimate tax liability." Gealer is a non-taxpayer as to the audit of 4th Dreamer. He simply reasonably asked to be treated in parity with Weiner in the audit. He argues he is entitled to know the audit issues and to timely adduce evidence in support of his position on those issues. Gealer asserts he has the right, as a 50% shareholder, and as an individual potentially personally liable for any tax assessment against 4th Dreamer, to adduce evidence in opposition to any proposed assessment with which

he disagrees. Gealer argues that since he could be personally held liable for a tax assessment levied against 4th Dreamer he has the right to participate in the audit and present exculpatory evidence, regardless of Weiner's or the IRS's desire to exclude him. That is what the District Court denied him, and erred doing so.

In short, Gealer did not seek to enjoin the IRS's assessment or collection of any outstanding tax liability. Nor did he seek to enjoin the IRS from conducting the audit in a timely manner. Nor did he seek to prevent the IRS from collecting any taxes that the IRS determined were unpaid. Rather, Gealer challenged the *procedure* by which the Service proposed to conduct its audit. Therefore, the Anti-Injunction Act does not forbid Gealer's claim.

In its order, the District Court oversimplified the analysis of the Declaratory Judgment Act by stating that it "excludes tax cases" from review under the APA. A18. Judge Byrne's reading of the "plain language" of this Act conflicts with the published intent of Congress in amending the APA to allow for reviewability of tax investigations. H.R.Rep. No. 94-1656, 9th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. Vol. 5 6121-6133.

Further, persuasive authority exists which finds that the Declaratory Judgment Act, just like the Anti-Injunction Act, does not preclude claims challenging the *procedure* by which the IRS assesses and collects taxes. Cunningham v. U.S.C.I.R., 165 B.R. 599 (N.D.Tex. 1993), citing Rodriguez, 629 F.Supp. at 341 and Yanicelli v. Nash, 354 F.Supp. 143, 151 (D.N.J. 1972).

Finally, the Declaratory Judgment Act is coterminous with the Anti-Injunction Act: "If suit is allowed under the Anti-Injunction Act, it is not barred by the Declaratory Judgment

Act." Perlowin v. Sassi, 711 F.2d 910, 911 (9th Cir. 1983). Therefore, Gealer's complaint is not barred by the Declaratory Judgment Act.

B. THE COURT OF APPEALS' ORDER

The Ninth Circuit held that the audit of 4th Dreamer is now completed because 1) the IRS issued a Notice of Deficiency to 4th Dreamer for the tax year ended May 31, 1995, and 2) 4th Dreamer successfully challenged that notice of deficiency in the U.S. Tax Court. Those facts do not establish that the audit is concluded or that the appeal was moot. For instance, the IRS initially sought to audit 4th Dreamer for the tax year ended May 31, 1995. The IRS then sua sponte expanded the audit to include the tax year ended May 31, 1996. Of course, nothing prohibits the IRS from seeking to further expand the audit into the tax year ended May 31, 1994 or into other tax years or issues. Therefore, the audit is not concluded.

At most, the facts relied upon by the Appeals Court established that the issues as to the causes of action seeking to quash the summons were moot as to whether the summons should be enforced. However, as should now be abundantly clear, Gealer primarily sought review under the APA, and rightly sought injunctive, and/or declaratory relief concerning his right to participate in full parity with Michael Weiner in the proposed audit of 4th Dreamer. Those issues were not mooted by the events following the District Court's order dismissing the complaint with prejudice. Moreover, the fact that the District Court later enforced the summons has no bearing on whether Gealer should have the right to participate in full parity in the audit.

In Church of Scientology of California v. United States, 506 U.S. 9, 18 (1992) the Court held that compliance with a summons enforcement order does not render an appeal moot as long as the Court of Appeals can effectuate some relief for the appellant. This Court can still effectuate some important relief on Gealer's behalf by determining the issues raised in this appeal. Specifically, the Court can order the IRS to inform Gealer as to the exact status of the audit, can order the IRS to provide Gealer with all documents relied upon in the audit, can order the IRS to provide Gealer with copies of the notes taken from meetings with Michael Weiner or his counsel, can order the IRS to include Gealer in any continued audits of 4th Dreamer, can order the IRS to permit Gealer to respond to any audit or examination question or alleged anomalies and to submit oral and documentary evidence touching and concerning such matters before the IRS rules on the issues. To this extent it is significant and telling that the Government's counsel refused to unequivocally state that the IRS had forever concluded the audit of 4th Dreamer when asked by the Ninth Circuit Court of Appeals at oral argument. Rather, the Respondent's attorney stated that she did not have exact knowledge as to the status of the audit. If the United States was serious in its position that the audit was completed, and would not be continued or revived later, or expanded to additional years or to additional entities, surely the United States' attorney would have come to oral argument prepared to make such a factual response. Since the Respondents' attorney could not so state, the Ninth Circuit Court's unsupported conclusion that the audit was compete was erroneous.

Moreover, the Ninth Circuit erred in not following its own precedent in Hutchinson v. United States, 677 F.2d 1322,

1326 Fn 3 (9th Cir. 1982) where the Court held "the effect of this decision once it becomes final, will be to render this refund suit essentially moot. Nevertheless, we assess the propriety of the dismissal of the refund claim on jurisdictional grounds in light of the facts as they existed when taxpayer filed his action in the district court."

The Ninth Circuit erred in not recognizing and ruling upon critical taxpayers' rights issues raised by Gealer since those issues are likely to return to haunt and imperil Gealer and all other similarly situated taxpayers in the future. See Doe v. United States Civil Service Comm'n, supra, at 553-555. This case presents a rare opportunity for this Court to review the interaction between the APA and the IRS, and by implication from the District Court's order the Anti-Injunction Act and the Declaratory Judgment Act, because few of the thousands of IRS audits conducted each year result in important questions of law requiring analysis and decision by the United States Court of Appeals, let alone this august Court. The IRS has within its power the ability to conclude audits quickly by voluntarily ending the audit, receiving the benefit of perfunctory (essentially rubber stamped) orders enforcing summons, and issuing premature and unconstitutionally confiscatory notices of deficiency. The IRS has the virtually unlimited money, time and resources that no taxpayer can match. Therefore, few, if any, taxpayers can effectively challenge the IRS even when their conduct is heinously and blatantly unconstitutional, and runs roughshod over a taxpayer's "bill of rights" granted immunity, right or privilege. Do we want to give the IRS the unfettered ability to abuse taxpayers such as Gealer knowing that few taxpayers have the resources to protect their rights? The number of reported cases involving the IRS and the APA are

tiny, confusing, and speak at cross-purposes. This area of law and these nationally important questions are ripe for analysis and decision by the Supreme Court for the benefit of Gary Gealer and all taxpayers. Without the Court's ruling the IRS is free to thwart review by declaring an audit to be completed.

Given the divergent cases below, it is imperative that the Court set the record straight and declare when IRS action may be reviewed by our Courts under the APA or any other authority. Moreover, the language of 5 U.S.C. §704 suggests that the APA does allow review of "final" agency action. If the 4th Dreamer audit were completed as the Ninth Circuit appears to rule, review would have been allowed under the APA.

III. THE QUESTIONS PRESENTED ARE VITALLY IMPORTANT TO OUR NATION

A key underlying issue in this appeal is the continuing application of the Doctrine of Sovereign Immunity. This Court has acknowledged that it would be a "procrustean task" to reconcile all its sovereign immunity decisions. Malone v. Bowdoin, 369 U.S. 643, 182 S.Ct 980, 8 L.Ed.2d 168 (1963). The passage of time has only made the task more difficult.

In the Supreme Court decision Nevada v. Hall, Justice Stevens points to the immunity of the King in feudal England as the origin of the modern Sovereign Immunity Doctrine:

> "Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued. The King's immunity rested primarily on the structure of the feudal system and secondarily on the fiction that the

King could do no wrong. Nevada v. Hall, 440 U.S. 410, 414-415 (1979, Stevens, J. Dissenting).

This outdated mode of thinking has no bearing in modern American life where, in fact, the government can do wrong, does do wrong, and must be brought to heel by the federal courts when that happens. The people, including Gary Gealer, must have the right to the Courts' review of those governmental actions that are alleged to be wrong, including this clearly wrong action by the IRS. This Court should set the record straight as to what rights taxpayers (citizens) have to seek redress against their government through the courts.

Our founding fathers demonstrated their repudiation of the concept that the King could do no wrong and could not hold itself above the law when they declared "we the people" are forming this union with three branches of government, each with separate powers to ensure that no one person or branch of government could wrest power from the people or from other branches of government.[7] None of the three branches of government is the highest governmental power. This demonstrates the inconsistency and fundamental unconstitutional unfairness of applying sovereign immunity to prevent lawsuits against the executive branch and the IRS.

The Doctrine of Sovereign Immunity offends the very principles upon which our government was founded. There is clear irony in the fact that a country founded on an indictment of government has allowed the Doctrine of Sovereign Immunity

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[7] In fact, the Supreme Court in its first opportunity to apply sovereign immunity held that a citizen could sue the State of Georgia. See John Paul Stevens, Is Justice Irrelevant?, 87 N.W.L.Rev. 1121, 1122 (1993).

to develop. See, Note, "Rethinking Sovereign Immunity after Bivens," 57 N.Y.U.L.Rev. 597, 607 (1982).

Since the Doctrine of Sovereign Immunity was created by the courts, this high court has full authority to allow Gary Gealer to prosecute his claims and seek to have the court preserve his rights and to declare that the United States of America and its agency, the IRS, have done wrong.

Justice Scalia wisely pointed to the fact that despite wide criticism, and Congress taking steps toward limiting its effects, ironically and unfortunately the doctrine has had its reach actually fortified.[8] This criticism is clearly earned in this case. Despite the Congressional intent to remove sovereign immunity as a defense available to the United States, the District Court held here that the United States could not be sued because of sovereign immunity.

Justice Stevens harshly criticized sovereign immunity by comparing the "judge-made doctrine" to a leviathan whose tentacles deposit seeds of injustice everywhere. John Paul

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[8] Professor Scalia stated the following:

"Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth, calling into question not only its utility but even the legitimacy of its alleged origins. ... criticism seems to have confirmed the [United States Supreme] Court in the error of its ways. Not only has there been no judicial elimination of the doctrine of sovereign immunity as applied to the federal government, but recently the scope of the doctrine has in some respects been extended beyond what it was in 1882." Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Administrative Actions: Some Conclusions from the Public-Lands Cases, 68 Mich.L.Rev. 867, 868 (1970).

Stevens, Is Justice Irrelevant?, 87 N.W.L.Rev. 1121 (1993). That is the case here.

Now is the time for this high Court to promote justice by creating another judicial exception to the Doctrine of Sovereign Immunity, to rule on the Doctrine of Sovereign Immunity as it is effected by the APA, and to rule on the interplay between the APA and the Anti-Injunction Statute and the Declaratory Judgment Act.

This Court has already recognized the equitable jurisdiction exception to the Doctrine of Sovereign Immunity. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962). The Ninth Circuit Court of Appeals' justices stated at oral argument that they felt that only the Supreme Court can create an exception to the Doctrine of Sovereign Immunity, which at least one Ninth Circuit Justice criticized broadly from the bench.

Another issue presented is that precedent has established in numerous cases that the District Courts have jurisdiction to hear a complaint for declaratory relief when the defendant in the declaratory relief action has an available coercive action in the District Court that it could bring against the plaintiff in the first instance. See generally, Morongo Band of Mission Indians v. Cal. State Board of Equal., 858 F.2d 1376 (9th Cir. 1988) ; Bell & Beckwith v. USA, et al., (6th Cir. 1985) 766 F.2d 910, 912 "[F]ederal question jurisdiction exists in those cases in which the plaintiff's claim, though itself not raising a federal question, asserts a defense to a claim that would raise a federal question and that defendant could have asserted in a coercive action."); General Ry Signal Co. v. Corcoran, 921 F.2d 700, at 706 n. 6 (7th Cir. 1991); Comm'l Nat'l Bank of Chicago v. Demos, 18 F.3d 485, 488 (7th Cir. 1994); Franchise Tax Bd v. Const.

Laborers Vacation Trust for Southern California et al, 463 U.S. 1, 19-20 (1983).

The District Court refused to follow the lead of Morongo, supra, contending that Gealer had not cited to a statute that waived the government's sovereign immunity. However, Gealer had cited correctly to 5 U.S.C. § 702. Moreover, if this Court declines to hold that 5 U.S.C. §702 constitutes a waiver of sovereign immunity sufficient to confer jurisdiction on the United States District Court to hear this case, this court need simply create a judicial exception to the present Doctrine of Sovereign Immunity. Such an exception would simply hold that when the United States of America or one of its agencies has a potential coercive action, such as the right to petition the District Court to enforce an IRS Summons, then the District Court has jurisdiction over the citizen's pre-emptive complaint for declaratory relief. This is in line with Congressional intent. This will give citizens a proper forum to meet the IRS head on and to have a chance to curb abusive, unconstitutional behavior by the IRS.

This Court should seize this rare opportunity to set to rest the issue of a citizen's legitimate right to challenge government action by the IRS through the courts. Unless this Court grants review, the IRS will be free to abuse its taxpayers with impunity and often escape the court's review of its unconstitutional behavior by hiding behind the Doctrine of Sovereign Immunity.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 11, 2000

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY GEALER, Petitioner-Appellant,	)	No. 98-45419
v.	)	D.C. No. CV 98-2321-WMB (AJWx)
United States of America, Its Agency the Internal Revenue Service, Kristina Stanley, Revenue Agent, Respondents-Appellees.	)	OPINION

2000 U.S. App. Lexis 11835, 2000-1 U.S. Tax Cas. (CCH) 50, 511

April 3, 2000, Argued and Submitted, Pasadena, California May 24, 2000, filed.

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED

OPINIONS, PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-98-02321-WMB-RCx. William Matthew Byrne, Jr., District Judge, Presiding.

DISPOSITION: Appeal DISMISSED.

JUDGES: Before: CANBY, NOONAN, AND W. FLETCHER, CIRCUIT JUDGES

OPINION: MEMORANDUM[1]

In its brief before this court the government raised the possibility that this case is moot. If a case becomes moot while on appeal, the appeal must be dismissed. *Dufresne v. Veneman*, 114 F.3d 952, 954 (9th Cir. 1997). A case becomes moot if "an event occurs that prevents the court from granting effective relief." *American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997).

In the district court, petitioner-appellant Gealer sought to quash the IRS summons requiring him to produce documents needed in an audit of Fourth Dreamer, Inc. and also sought

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[1]This Disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

injunction and declaratory judgment that would have required the IRS to allow Gealer to participate more fully in the audit. Gealer appeals the denial of injunctive and declaratory relief. However, the audit is now complete, a notice of deficiency has been sent to the corporation, and the corporation is challenging the notice of deficiency in tax court. Because Gealer cannot be granted any effective relief, his claims are moot. See Generally, *DuFresne, 114 F.3d at 954; American Tunaboat Ass'n v. Brown*, 67 F.2d 1404, 1407 (9th Cir. 1995); *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015 (9th Cir. 1990).

This appeal is therefore DISMISSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY GEALER, et al., Petitioners,	)	
v.	)	Civil Case No. 98-2321 WMB
UNITED STATES OF AMERICA, et al., Respondents.	)	

1998 U.S. Dist. LEXIS 11237; 98-2 U.S. Tax Cas. (CCH)
P50,594; 82 A.F.T.R.2d (RIA) 5669

June 29, 1998, Decided
June 30, 1998, Filed; July 1, 1998, Entered

DISPOSITION: Government's motion to dismiss with prejudice GRANTED.

JUDGES: Wm. Matthew Byrne, Jr., United States District Judge.

OPINIONBY: Wm. Matthew Byrne, Jr.

OPINION: ORDER DISMISSING PETITION TO QUASH IRS SUMMONS, WITH PREJUDICE

I. PROCEDURAL BACKGROUND

On July 3, 1997, petitioner Gary Gealer ("Gealer" or "petitioner") filed his first motion against the United States ("the government"), to quash an Internal Revenue Service (IRS) summons. On February 26, 1998, this Court entered an order dismissing this motion to quash for lack of subject matter jurisdiction, as petitioner had failed to show that the government had waived sovereign immunity.

Gealer's original petition had asserted jurisdiction under 26 U.S.C. @ 7609, which provides special procedures for third-party summonses issued by the IRS. The Court found that "Gealer does not qualify as a third-party record keeper under a plain reading of the statute, and therefore this Court lacks jurisdiction under @ 7609 to hear petitioner's motion to quash."[1] (Feb. 26, 1998, Order at 4).

Petitioner has subsequently filed a second petition to quash summons, which seeks declaratory and injunctive relief[2]. The

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[1]Although petitioner purported to amend his first petition when he filed opposition papers, the Court found that under Ninth Circuit authority, the court must "look to the original, rather than to the amended, complaint" in determining whether subject matter jurisdiction exists. Id. (quoting Morongo Band of Indians v. Cal. St. Bd. of Equal., 858 F.2d 1376, 1380 (9th Cir. 1988)).

[2]In this new petition, Gealer asserts that the Court's previous Order "allowed that the court would have jurisdiction under the terms set forth in the Petitioner's First Amended Petition to Quash, which the Court did not consider on technical procedural grounds." (Pet., P 46). This assertion

petition lists both Gealer and a corporation, the Fourth Dreamer, as petitioners and names the United States, the IRS, and IRS agent Kristina Stanley, as respondents. The government filed a notice of related case and the matter was transferred to this Court.

In his new petition, Gealer asserts jurisdiction on the following twelve grounds: 26 U.S.C. @ 7602; 28 U.S.C. @ 1340; @ 5 U.S.C. @ 702; 5 U.S.C. @ 706; 28 U.S.C. @ 2201; 26 U.S.C. @ 7402; 26 U.S.C. @ 7604(b); 28 U.S.C. @ 1331; his constitutional right to privacy; the ultra vires exception to sovereign immunity; equitable jurisdiction; and this Court's alleged jurisdiction over potentially "coercive actions" brought by the government against petitioner.
(Pet., PP 2-16).

The government now moves to dismiss with prejudice, on the grounds that the Court lacks subject matter jurisdiction[3]. It further argues that the attorneys who have filed the petition on behalf of the Fourth Dreamer corporation do not have authority to represent that company. The government requests that this Court impose sanctions against Gealer's attorneys because the petition is "patently frivolous" and because the Fourth Dreamer is improperly named as a petitioner.

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is not correct, as the February 26th Order did not rule in any way on the merits of petitioner's alternative jurisdictional arguments.

[3] In the alternative, the government moves for the Court to deny the petition on the merits or to grant summary judgment.

II. FACTUAL BACKGROUND

During the tax year ending on May 31, 1995, Gealer and Michael Weiner were officers and 50% shareholders in a Class C corporation called The Fourth Dreamer, Inc[4]. In November, 1995, the partners agreed to dissolve the Fourth Dreamer. Pursuant to that agreement, Gealer paid $ 5,000 to Weiner to cover the costs associated with dissolution of the company. After this agreement, petitioner "did not maintain any records of the Fourth Dreamer." (Id. at PP 17, 18, 20, 23).

Unbeknownst to Gealer, Weiner continued to operate the corporation after their agreement. On February 12, 1997, Gealer learned that the IRS had begun an audit of the Fourth Dreamer through the tax year ending May 31, 1995. Gealer and Weiner discussed the audit and agreed that, "partially in consideration for the aforesaid $ 5,000.00 paid to Weiner," Gealer was "solely authorized to retain tax counsel" to represent the corporation. They also agreed that Gealer should retain certain documents for preparation of the tax audit, although Gealer claims that many of these documents "relate to years prior to the years now alleged to be under audit." Gealer then hired the law firm of Lon B. Isaacson Associates, to represent both himself and the corporation in the audit. Weiner, however, subsequently informed the IRS that only he, Weiner, had authority to represent the Fourth Dreamer; he then hired his own tax counsel to represent the corporation. (Id. at PP 24-31).

Gealer now seeks that the IRS "treat him in parity with Weiner

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[4] Petitioner notes that he signed the corporate tax return on behalf of the company for the tax year ending on May 31, 1995. (Pet. P 3).

as respects the audit, and that he be accorded full access of all books, records, and materials utilized by the IRS in the audit." (Id. at P 34). Gealer claims that the IRS now takes the position that "Gealer should be and is barred from participating in material respects in the proposed tax audit of The Fourth Dreamer.[5]" (Id. at P 36). Gealer also asserts that Weiner

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[5] Gealer also states that the IRS "has repeatedly taken the position . . .to prohibit Mr. Gealer from participating in the audit in any form whatsoever." (Opp'n at 4). This assertion is contradicted by a September 16, 1997, letter from the IRS to Gealer's attorney-a letter Gealer attaches as an exhibit to his own petition. See (Pet., Ex. F); see also Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 (9th Cir. 1990) (holding that courts may consider documents attached to a complaint as part of the complaint). In this letter, IRS attorney Kirk Paxson writes that The purpose of this letter is to provide your client with guidelines for his participation in the proposed audit of the 4th Dreamer, Inc. . . . It is in the best interests of the I.R.S. to involve your client in the proposed audit of Dreamer for the 1995 taxable year since your client was a 50% shareholder and officer of the taxpayer during that year. For this reason, you and your client will be contacted to provide information to complete the audit. Prior to making any final adjustments to the corporate tax return for Dreamer's 1995 year you will be offered an opportunity to provide any explanations or information that you feel may have a bearing on those adjustments. You will have all the access to Dreamer's records that disclosure statutes permit.
(Pet., Ex. F). In addition, the IRS requested the petitioner withdraw his first petition to quash but indicated that "the whether or not your petition is withdrawn, the I.R.S. intends

opposes Gealer's "participating in the proposed Tax Audit in all respects." (Id. at P 37).

According to Gealer, the IRS and Weiner's positions are based on the argument that Gealer is no longer a current stockholder in the corporation. Gealer, however, contends that Weiner "tricked" him into signing certain "surrender" documents by fraudulently misrepresenting that the corporation would be dissolved. (Id. at P 38). Gealer now asserts that this fraud "operates to nunc pro tunc restore Mr. Gealer as an officer and 50% shareholder" of the corporation. (Opp'n at 2).

On June 23, 1997, the IRS issued a summons on Gealer. On July 3, Gealer filed his first petition to quash, which this Court dismissed on February 26, 1998. The parties subsequently attempted to settle the matter but were unsuccessful. (Pet., P 48) On March 19, 1998, the IRS served a second summons upon Gealer, seeking documents from the tax periods ending on May 31, 1995, and May 31, 1996[6]. Gealer filed the present petition on March 31, 1998.

Gealer asserts that the conduct of the IRS violates his Due Process rights, that he is an interested party in the audit and

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to involve your client in the proposed audit of Dreamer as outline above." Id.

In a "rebuttal" brief filed a few days before the hearing, petitioner admits that the IRS will allow Gealer at least some participation in the audit. (Pet'r Rebuttal at 7).

[6] According to the government, the IRS withdrew the June 23, 1997, summons on April 28, 1998. (Mot. to Dismiss, at 12). The government argues that, to the extent petitioner is challenging the 1997 summons, that issue is now moot.

should not have to produce documents unless he is allowed full participation, that the two summonses were issued in bad faith, that the summonses are overbroad and abused the summons process, that he is entitled to declaratory relief that he be allowed to participate in the audit, and that the IRS be enjoined from denying Gealer full parity with Weiner. Gealer claims that he "does not seek to restrain the assessment or collection of a tax," although he does seek a declaratory order that he "is not liable for taxes or any alleged penalties or interest . . . to be due and owing by the Fourth Dreamer, Inc., since the IRS has barred [him] from being allowed to participate fully, fairly, and meaningfully in the audit.[7]" (Id. at PP 78, 115).

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[7] Both sides make evidentiary objections to the declarations and exhibits filed by the other party. Gealer objects that certain paragraphs in the declaration of IRS agent Stanley are hearsay or without proper foundation. He also objects to the government's request of judicial notice of several documents from the first Gealer case, including Gealer's petition, the declarations of Gealer and Stanley, and this Court's Order dismissing petitioner's motion to quash.

Petitioner asserts that "if the Court takes judicial notice of the prior related case, then the Court must consider the entire file and must be provided with copies of the entire file." (Pet'r Obj. at 2). It is unclear why this Court needs the entire file to consider its prior Order.

The government, in turn, objects to all of the exhibits attached to Gealer's opposition on the grounds that they have not been properly authenticated and that exhibits two and three are inadmissible hearsay. It also objects to portions of Gealer's declaration on the grounds of hearsay, inadmissible opinion, lack of personal knowledge, and irrelevance.

III. DISCUSSION

The government argues that 26 U.S.C. @ 7602 authorizes the IRS to summon any person "having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax" and to require him or her "to produce such books, papers, records, or other data." 26 U.S.C. @ 7602(a)(2) (West 1989). The Ninth Circuit has recognized that this statute provides the IRS with "broad powers to summon information relevant to determining the liability of any taxpayer." Chen Chi Wang v. United States, 757 F.2d 1000, 1002 (9th Cir. 1985).

The government contends that the motion to quash procedure under @ 7609 applies only to third-party record keepers, and therefore is not available to petitioner. (Mot. to Dismiss at 11; see also 26 U.S.C. @ 7609(b) (providing that third-party recorder keepers have the right to begin a proceeding to quash a summons within 20 days of receiving notice); Feb. 26th Order (finding that petitioner did not qualify as a third-party record keeper under @ 7609)).Petitioner concedes that the present petition is not brought under @ 7609. (Opp'n at 19).

The government also asserts that petitioner should have filed a complaint rather than a petition to quash. See Fed. R. Civ. Pro. 3 (West 1992) ("A civil action is commenced by filing a complaint with the court."); see also New Hampshire Fire Ins. Co. v. Scanlon, 362 U.S. 404, 406-07, 4 L. Ed. 2d 826, 80 S. Ct. 843 (1960) (indicating that, absent express statutory authorization, courts should be "extremely reluctant to allow proceedings more summary than the full court trial at common law"). Petitioner, in turn, argues that the petition should not be dismissed simply because it is "not technically styled as a

'complaint.'" (Opp'n at 19).

Even assuming that Gealer properly brought this action as a petition rather than as a complaint, he fails to demonstrate that the government has waived its sovereign immunity.

A. Sovereign Immunity.

"The United States, as a sovereign entity, is immune from suit unless it has consented to be sued. Wavier of immunity must be demonstrated by the party suing the United States." Cominotto v. United States, 802 F.2d 1127, 1129 (9th Cir. 1986); see also Ponsford v. United States, 771 F.2d 1305, 1309 (9th Cir. 1985) (holding that the 20-day limit to file a motion to quash under @ 7609 "must be strictly construed because it is a condition precedent to the waiver of sovereign immunity"). Petitioner must show, therefore, that the government has "unequivocally expressed" that it is waiving its immunity[8]. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985).

The Ninth Circuit has observed that "the bar of sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants," including IRS employees sued in their official capacity. Gilbert, 756 F.2d at 1458. Likewise, "federal agencies and instrumentalities . . . are similarly immune from suit." South Delta Water Agency v.

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[8] Petitioner refers to sovereign immunity as a doctrine that has been "much-criticized" by legal scholars and that is inconsistent with this country's traditions. (Opp'n at 5-7). Petitioner argues, however, that the government has waived its sovereign immunity based on 5 U.S.C. @ 702 and other grounds.

United States, 767 F.2d 531, 536 (9th Cir. 1985).

B. Petitioner's Jurisdictional Arguments

In his second petition, Gealer asserts twelve new grounds for establishing jurisdiction. However, some statutes to which he cites, such as the Administrative Procedure Act (APA), do not independently confer subject matter jurisdiction upon this Court. In addition, Gealer has failed to demonstrate that the government has waived its sovereign immunity.

1. 28 U.S.C. @@ 1331 & 1340

In Hughes v. United States, the Ninth Circuit observed that general jurisdictional statutes such as 28 U.S.C. @ 1331 and 1340 "cannot . . . waive the government's sovereign immunity. A mere assertion that general jurisdictional statutes apply does not suffice to confer jurisdiction when, as in this case, the government did not waive its immunity.[9]" 953 F.2d 531, 539 n.5 (9th Cir. 1992) (citations omitted).

Citing Califano v. Sanders, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977), petitioner argues that " 28 U.S.C. Section

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[9] Section 1331 provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. @ 1331 (West 1993).

Section 1340 provides that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. . . ." 28 U.S.C. @ 1340 (West 1993).

1331 serves to grant subject matter jurisdiction unless another statute bars jurisdiction." (Opp'n at 7). Petitioner does not cite to any specific language in Califano, but rather refers to a footnote in the Ninth Circuit's Stickleman decision, which states that the Califano Court "found that a 1976 amendment to 28 U.S.C. @ 1331, 90 Stat. 2721, is a jurisdictional grant except to the extent that some specific statute precludes review." Stickelman v. United States, 563 F.2d 413, 415 n.2 (9th Cir.1977) (citing Califano, 430 U.S. 99, 104-107, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)). In Califano itself, the Court observed that Congress amended @ 1331(a) in 1976 to eliminate the requirement of a specified amount in controversy as a prerequisite to the maintenance of "any [@ 1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." The obvious effort of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate. Califano, 430 U.S. at 105 (citations omitted)

None of the language cited in either Califano or Stickleman suggests that @ 1331 waives sovereign immunity. As the Ninth Circuit in Gilbert observed, @ 1331 "merely provides that the district court shall have original jurisdiction in all civil actions arising under the Constitution, laws or treaties of the United States. It cannot by itself be construed as constituting a waiver of the government's defense of sovereign immunity." 756 F.2d at 1458 (citations omitted).

2. 5 U.S.C. @ 702

Section 702 of the APA does not itself provide jurisdiction, although it does waive sovereign immunity under some conditions[10]. The Ninth Circuit has held that "it is beyond question . . . that the APA does not provide an independent basis for subject matter jurisdiction in the district courts." Tucson Airport Authority v. General Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998); see also Califano, 430 U.S. at 105 ("The APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions."). Courts have recognized, however, that the APA does waive sovereign immunity, with "several limitations," Tucson, 136 F.3d at 645, although this waiver "does not by itself confer jurisdiction." South Delta, 767 F.2d at 535; Washington v. Udall, 417 F.2d 1310, 1320 (9th Cir. 1969) (emphasizing "strongly" that the APA does not constitute "a blanket wavier of sovereign immunity").

The APA waives sovereign immunity "only if three conditions are met: (1) its claims are not for money damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its claims do not seek relief expressly or impliedly

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[10] Section 702 provides that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. @ 702 (West 1996).

forbidden by another statute.[11]" Tucson, 136 F.3d at 645.

Petitioner contends that his action does not seek monetary damages against the United States, as he is requesting declaratory and injunctive relief. Petitioner cannot meet, however, the second and third conditions described in Tucson.

a. Petitioner's Alternative Available Remedy

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[11] Petitioner cites to Beller v. Middendorf for the proposition that in "actions claiming that a government official acted in violation of the Constitution or of statutory authority . . . Congress has either waived sovereign immunity or the doctrine does not apply." 632 F.2d 788, 796 (9th Cir. 1980) (quoting Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978), rev'd on other grounds sub nom., Brown v. Glines, 444 U.S. 348, 62 L. Ed. 2d 540, 100 S. Ct. 594 (1980)). But see High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 572 (9th Cir. 1990 (stating that Beller was overruled on other grounds by a subsequent Supreme Court decision)). The Glines Court found that the government had waived sovereign immunity under the APA. Id.

By its terms, however, section 702 limits its waiver of sovereign immunity, by providing that "nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. @ 702 (West 1996); see also Tucson, 136 F.3d at 646 (interpreting @ 702 to mean that "the claims must not seek relief 'expressedly or impliedly forbidden' by another statute"). In this case, the Anti-Injunction Act and Declaratory Judgment Act forbid the type of relief plaintiff is seeking.

Gealer asserts that he "cannot utilize another court to obtain the relief sought in this petition.[12]" (Opp'n at 11). However, according to petitioner's own exhibits, the IRS has stated that the IRS wants to "involve [Gealer] in the proposed audit of Dreamer" and that he "will be offered an opportunity to provide any explanations or information that [he] feel[s] may have a bearing on those adjustments" to Dreamer's corporate tax return. (Pet., Ex. F). Gealer fails to acknowledge in his opposition papers this IRS statement (and in fact asserts that the IRS seeks to "prohibit [him] from participating in the audit in any form whatsoever"). (Opp'n at 4). As such, he fails to address why the audit process itself, or possibly a post-audit judicial remedy, is not "available" to resolve any disagreements he may have with the audit or its results.

The Ninth Circuit's decision in Zimmer v. Connett offers some guidance on this point. In that case, the IRS sought to reexamine the books and records of taxpayers whom it had previously audited. 640 F.2d 208, 209 (9th Cir. 1981). The taxpayers filed suit in federal court, asserting jurisdiction based on 28 U.S.C. @ 1361, which provides original jurisdiction to courts to compel United States officers or employees "to perform a duty owed to the plaintiff." 28 U.S.C. @ 1361 (West 1993). The taxpayers sought declaratory and injunctive relief to require the District Director of the IRS "to grant them a hearing

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[12] The government mistakenly contends "whether or not Gealer can utilize another court to obtain the relief sought in this petition is irrelevant." (Reply at 13). As the Tucson Court observed, this condition is relevant as to whether the APA waives sovereign immunity. See Tucson, 136 F.3d at 645.

before permitting an additional inspection of their books." Zimmer, 640 F.2d at 209.

The Ninth Circuit affirmed the district court's dismissal of the taxpayers' claims, in part on the grounds that "because the taxpayer had an adequate remedy at law, the district court had no jurisdiction over taxpayers' claim for equitable relief." Id. at 209. The Court explained that, if a taxpayer refuses to comply with a summons issued pursuant to 26 U.S.C. @ 7602 to examine the taxpayers' books, the taxpayer was not without a legal remedy. Id.

Although there are penalties for contumacious refusal to comply with a summons [issued pursuant to @ 7602], should the taxpayer appear and assert good faith defenses, the Service would be required to resort to an action to enforce the summons under 26 U.S.C. @@ 7402(b), 7604(a). Taxpayer can assert his claims of illegality of the second inspection in that proceeding. As taxpayer need not surrender his records prior to judgment in the enforcement proceeding, he suffers no damage before having an opportunity to assert his defenses. Id. Petitioner has an adequate remedy to contest the summons during enforcement proceedings.

b. Statutes Forbidding Gealer's Requested Relief

Even if petitioner did not have an adequate alternative remedy, Gealer's proposed remedies are prohibited by at least two statutes. The Declaratory Judgment Act (28 U.S.C. @ 2201), for example, provides that declaratory relief is unavailable with respect to cases involving federal taxes. See E.J. Friedman Co. v. United States, 6 F.3d 1355, 1359 (9th Cir. 1993).

Similarly, 26 U.S.C. @ 7421(a) (the Anti-Injunction Act) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.[13]" 26 U.S.C. @ 7421(a) (West Supp. 1998). The Act's purpose is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" Bob Jones Univ. v. Simon, 416 U.S. 725, 736, 40 L. Ed. 2d 496, 94 S. Ct. 2038 (1974) (quoting Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, 8 L. Ed. 2d 292, 82 S. Ct. 1125 (1962)).

The government argues that an order by this court "directing the extent to which Gealer shall be allowed to participate in future audit activity" would "certainly . . . restrain assessment or collection of taxes." (Mot. to Dismiss at 18). Petitioner, in turn, claims that his action "does not seek to prevent the IRS from assessing or collecting a tax, nor does it attack the merits of the imposition of a tax." (Opp'n at 10).

Despite this claim, however, Gealer's petition seeks, among other remedies, that this Court enter an "Order of Declaratory Relief that Gary Gealer is not liable for taxes or any alleged penalties or interest the [IRS] may assess to be due and owing by The Fourth Dreamer, Inc., since the IRS has barred Gary

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[13] The statute contains a number of exceptions to this restriction, specifically, @@ 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6672(b), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436. Petitioner does not assert that any of these exceptions apply to his case.

Gealer from being allowed to participate fully, fairly, and meaningfully in the audit." (Pet., P 115). Such an order, on its face, would interfere with the collection of taxes by the IRS.

In addition, in Zimmer, petitioners sought injunctive relief to require the IRS to hold a hearing before it could reexamine petitioners' books. Although the Court stated that petitioners' requested equitable relief was barred because they had an adequate remedy at law, it also noted that it had "serious doubts concerning taxpayers' claim because of the Anti-Injunction Act." 640 F.2d at 209. The Court observed that to impose a requirement for a hearing would initiate a process that would culminate in fixing a standard under which the reasonableness of a second examination would be determined. Such a standard and its review on appeal, could very well have the effect of interrupting the process of assessment of taxes by the Service, an effect similar to that of an injunction. This would be contrary to congressional policy which prohibits interference with the process of assessing taxes. Tax assessments must be contested in the Tax Court or, upon payment of the assessment, in an action for a refund in the Federal District Courts or the Court of Claims. The courts have consistently rebuffed taxpayers' attempts to circumvent that procedure. Absent a clear and explicit congressional mandate, we shall not depart from these well marked pathways. Id. at 209-210 (citations omitted); see also Enochs, 370 U.S. at 7 ("The manifest purpose of @ 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund.").

Similarly, in this case, petitioner's purported motion to quash arguably interferes "with the process of assessing taxes," as he

is resisting providing documents necessary to the audit of the Fourth Dreamer. Although Gealer claims he is only "petitioning to be treated fairly during the audit," the determination of whether the government is reasonable in placing any limits on Gealer's participation in the audit would arguably interrupt assessment. It would also run "contrary to congressional policy which prohibits interference with the process of assessing taxes" absent clear statutory authority. Zimmer, 640 F.2d at 210. Petitioner's requested injunctive relief therefore is barred under the Anti-Injunction Act.

Because Gealer has an alternative remedy and because his proposed declaratory and injunctive relief is barred under 28 U.S.C. @@ 2201 and 7421(a), sovereign immunity is not waived under the APA[14].

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[14] Petitioner claims that Rodriguez v. United States stands for the proposition that " 26 U.S.C. Section 7421 does not prohibit procedural challenges to IRS activity." (Opp'n at 9 (citing 629 F. Supp. 333, 341 (N.D. Ill. 1986)). Rodriguez involved a post-enforcement challenge by a taxpayer who alleged that the IRS did not follow proper procedure when it placed a levy on the taxpayer's bank account after an IRS computer erroneously generated a refund check to the taxpayer. 629 F. Supp. at 341. The Court found the Anti-Injunction Act inapplicable because "by its own language, and the language of @ 6213(a) [requiring taxpayers receive notice before a levy is made against them], the [Act] does not apply to a taxpayer's suit to enjoin a levy imposed either before notice of deficiency, during the 90-day period after that notice, or while a petition is pending in the Tax Court." Id. at 340.

In addition, section 6213(a) is specifically listed in the Act as an exception to its rule. Petitioner cites no similar statutory

3. 5 U.S.C. @ 706

Section 706 of the APA outlines the scope of review a court may undertake when assessing agency action, including its power to "hold unlawful and set aside agency action findings, and conclusions of law found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. @ 706(1)(B) (West 1996). Although this statute is listed in the petition as providing jurisdiction, petitioner's opposition fails to discuss @ 706. As mentioned above, "the APA does not confer jurisdiction on federal courts to review agency action." South Delta, 767 F.2d at 535.

4. 28 U.S.C. @ 2201

Petitioner next claims jurisdiction under the Declaratory Judgment Act, 28 U.S.C. @ 2201. As noted above, however, the plain language of the statute excludes tax cases:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986,[15] . . . any court of the United States, upon the filing of an appropriate pleading, may declare the

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authority in this case. Further, the Rodriguez Court noted that @ 6213(a) contained a waiver of immunity. Id. at 338. Petitioner has failed to identify any statute applicable to this case that waives immunity.

[15] Section @ 7428 provides for declaratory judgments relating to the status and classification of organizations under @ 501(c)(3).

rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C. @ 22-1 (West 1994) (emphasis added); see also E.J. Friedman, 6 F.3d at 1359 ("Because the case at bar involves federal taxes, declaratory relief is unavailable, and @ 2201 cannot serve as a wavier of sovereign immunity."); Hughes, 953 F.2d 531 at 536 (same holding).

5. 26 U.S.C. @@ 7402, 7602 & 7604(b)

Section 7402 of the Internal Revenue Code provides jurisdiction to courts to issue orders "as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. @ 7402(a) (West 1989). The provision also grants courts jurisdiction to enforce summons and for U.S. officers to bring damages suits if they are injured while discharging their duties. Id. at @ 7402(b)-(c). This section makes no mention of the right of private individuals to sue the U.S. government. Section 7602 provides the authority for the IRS to examine books and records and to summon individuals with respect to "ascertaining the correctness of any return." 26 U.S.C. @ 7602 (West 1989). This section does not discuss the jurisdiction of the courts to examine challenges to this summons process.

Section 7604(b) allows the United States to apply to a district court "for an attachment against" any person who neglects or refuses to obey a summons under @ 7602. 26 U.S.C. @ 7064(b) (West 1989). The statute makes no mention of the rights of private parties to sue in federal court.

6. Gealer's Right to Privacy

Gealer claims that, under United States v. First Bank, 737 F.2d 269, 273 (2d Cir. 1984), this Court should balance Gealer's right to privacy against the right of the IRS to issue and enforce a summons. (Opp'n at 14). Gealer also asserts that his right of due process is "affected by the IRS's illegal act." (Id. at 15). Again, Gealer has failed to demonstrate that sovereign immunity has been waived in this case.

7. The Ultra Vires Exception

Petitioner next claims that sovereign immunity is waived under the doctrine of ultra vires. The Ninth Circuit in Washington v. Udall observed that certain suits against a government officer acting in an official capacity were not "suits against the sovereign . . . only if (1) the officer's powers are limited by statute and his actions were ultra vires, or (2) the officer was acting unconstitutionally or pursuant to an unconstitutional grant of power from the sovereign." Udall, 417 F.2d at 1314; cf. Westside Property Owners v. Schlesinger, 597 F.2d 1214, 1219 (9th Cir. 1979) (noting a limitation on the ultra vires exception, namely that the doctrine of sovereign immunity "may be controlling in some suits . . . where the relief sought would work an intolerable burden on government functions, outweighing any consideration of private harm") (citation omitted).

Petitioner asserts that IRS Agent Stanley exceeded her statutory authority because she is not authorized under statute to nullify the contract between Gary Gealer and Michael Weiner

that stated Gary Gealer would be authorized to select counsel to represent The Fourth Dreamer, Inc. in the proposed audit and cannot determine that Gary Gealer cannot be represented personally in the audit. . . . Stanley's decision to conduct the audit while excluding Gary Gealer is arbitrary, capricious and violates Gealer's constitutional and taxpayer rights. Opp'n at 13. To the extent Gealer is claiming that the IRS exceeded its authority by "excluding" himself from the audit, his own exhibit appears to show that the IRS is not attempting to exclude him. Nor has Gealer identified any statute, regulation, or other authority to support his claim that the IRS exceeded its authority when it accepted Weiner as the sole authority for electing counsel for the corporation. See also Udall, 417 F.2d at 1316 ("The mere allegation that a federal officer's action is erroneous, due to a mistake of fact or law, does not necessarily constitute a claim that he was acting beyond his delegated authority.").

8. Equitable Jurisdiction

In interpreting the Anti-Injunction Act, the Supreme Court has held that, "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable, and . . . the attempted collection [of taxes] may be enjoined if equity jurisdiction otherwise exists." Enochs, 370 U.S. at 7. Plaintiff asserts that the government cannot prevail in this case, unless it demonstrates that IRS agent "Stanley is empowered with the right to act as Judge and without trial, sua sponte, rescind the valid contract between Gary Gealer and

Michael Weiner." [16] (Opp'n at 21). Gealer is assuming, however, that the government cannot prove (1) that the contract might be invalid, or (2) that the contract is not binding on the IRS. Gealer offers no legal support for his assertion that the IRS lacks the authority to recognize Weiner's choice of counsel rather than Gealer's, when the former partners apparently no longer agree over who has the power to choose corporate counsel. Because at least some possibility exists that the government could prevail in this matter, this Court does not have equitable jurisdiction.

9. Coercive Actions

Petitioner argues that this Court has jurisdiction "because the United States may bring a coercive action against Gary Gealer to enforce the summons.[17]" (Opp'n at 12). He further argues that "courts have jurisdiction especially under the declaratory judgment act in 28 U.S.C. Section 2201 when the defendant can bring a coercive action based upon federal question jurisdiction." Id. at 12. Again, however, Gealer has failed to identify any

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[16] Although it is unclear to which contract he is referring, Gealer is presumably discussing the purported contract between Weiner and himself that Gealer would choose the counsel to represent Fourth Dreamer in the audit.

[17] Gealer claims that Morongo Band stands for the proposition that coercive actions can arise under federal law, thereby creating jurisdiction under @ 1331. (Opp'n at 11). Morongo Band, however, did not involve the issue of the United States' sovereign immunity. See 858 F.2d 1376.

applicable statute in which the government has consented to be sued. In addition, the fact that this Court would have jurisdiction if the United States brought an enforcement action does not mean that the Court has jurisdiction to hear Gealer's claims pre-enforcement[18].

C. The Government's Claim that Fourth Dreamer Has Improperly Been Named as a Petitioner

The government contends that the petitioner's attorneys, Lon B. Anderson Associates, do not represent the Fourth Dreamer, which has purportedly retained its own counsel, Justin Goldner. It further asserts that the Fourth Dreamer has not authorized the filing of this petition and has been improperly named as a petitioner. (Mot. to Dismiss at 24). Gealer claims that, based on his agreement with Weiner, he has "the sole right to select tax counsel to represent The
Fourth Dreamer" and that Weiner "lacked the authority" to hire afterwards a different attorney to represent the corporation. (Opp'n at 22). In reply, the government notes that, even if Gealer and Weiner agreed that Gealer's attorneys would represent the corporation in the audit, the agreement does not extend to representing the Fourth Dreamer in this current court proceeding .(Reply at 23). It also notes that, in Gealer's

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[18] Because the government has not waived sovereign immunity and therefore this Court does not have jurisdiction to hear this petition, the Court need not reach the government's alternative argument that the IRS has a good faith basis for issuing its summons. See Morongo Band, 858 F.2d at 1380.

opposition, Gealer asserts that "the Petition was and is brought for the purpose of protecting Gary Gealer's pecuniary, legal and taxpayer rights;" the government contends that this "admission" demonstrates that the petition was brought solely on Gealer's behalf and not on the behalf of the Fourth Dreamer. (Id. at 24 (quoting Opp'n at 23)).

Whether or not Gealer has the authority to include Fourth Dreamer in his petition, he has failed to demonstrate that the government has waived its sovereign immunity.

D. Sanctions

Rule 11(c) permits the court to impose "an appropriate sanction upon the attorneys, law firms, or parties" for violations of subsection (b), which includes making "claims, defenses, and other legal contentions" that are not warranted by existing law or "by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law." Fed. R. Civ. Pro. 11(b) & (c) (West Supp. 1998). In addition, 28 U.S.C. @ 1927
provides that "any attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. @ 1927 (West 1994).

The government argues that this Court should impose sanctions on petitioner's counsel because (1) the petition is patently frivolous and (2) the Fourth Dreamer was improperly named as a petitioner. Gealer responds that this lawsuit was brought to protect his legal rights "after a careful revi ew of

theapplicable laws governing this issue." (Opp'n at 23).

Gealer's petition is, in fact, without merit. In addition, Gealer's papers misrepresent several key facts. First, in his petition, Gealer claims that this Court's first order "allowed that the court would have jurisdiction under the terms set forth in the Petitioner's First Amendment Petition to Quash, which the Court did not consider on technical procedural grounds." (Pet., P 46). This Court's Order did not indicate in any way how it would rule on these alternative grounds; indeed, many of the grounds in the "amended" petition were also alleged in Gealer's current petition.

Second, throughout his opposition brief, Gealer asserts that the IRS is seeking to prohibit his participation in the audit "in any form whatsoever." (Opp'n at 4). Gealer's argument is directly contradicted by an exhibit attached to his own petition, in which the IRS indicates that it wants "to involve [Gealer] in the proposed audit . . . [and that Gealer] will be offered an opportunity to provide any explanations or information that [he] feel[s] may have a bearing on those adjustments." (Pet., Ex. F). Throughout his opposition, Gealer ignores this exhibit and mischaracterizes the dispute as one of access to the audit, when in fact it appears that the parties simply disagree on the degree or manner in which Gealer will participate.

Although the Court recognizes these problems with petitioner's arguments, the Court denies the government's request for sanctions.

Title 5 U.S.C. §704 holds:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

Title 28 U.S.C. §1331 holds:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Title 28 U.S.C. §1340 holds:

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade."

26 U.S.C. §7421(a) holds:

"Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6331(i), 6672(b), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

28 U.S.C. §2201 holds:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal revenue Code of 1986 a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.